LIBRARY
SUPREME COURT, U. S.

FILED
JUL 27 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. **426**

FLORENCE SCOTT, FORMERLY FLORENCE MESLER MONTAGUE, AN INDIVIDUAL,

Petitioner,

v.

WKJG, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ALBERT L. JEFFERS,
Suite 4,
Indiana Bank Building,
Fort Wayne, Indiana
Attorney for Petitioner.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	10

CITATIONS

Cases.

Arnstein v. Porter, 154 F.2d 464	7
Benny v. Loew's, Inc., et al., Columbia Broadcasting Systems, Inc., et al., 239 F.2d 532	5
Grove Press, Inc. v. Greenleaf Publishing Co., 247 F.Supp. 518	8

Statutes Cited

28 U.S.C. Section 1254 (1)	2
17 U.S.C. Section 1(b) (d)	3

Miscellaneous

Article 1, Section 8, U.S. Constitution	6
Playwriting by Bernard Grebanier	6
The Play's The Thing by Lawrence Langner	6
13 C.J. 1113, Section 276, Note 30	7

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	10

CITATIONS

Cases.

Arnstein v. Porter, 154 F.2d 464	7
Berny v. Loew's, Inc., et al.; Columbia Broadcasting Systems, Inc., et al., 289 F. 2d 553	5
Grove Press, Inc. v. Greenleaf Publishing Co., 247 F.Supp. 518	8

Statutes Cited

28 U.S.C. Section 1254 (1)	2
17 U.S.C. Section 1(b) (d)	4

Miscellaneous

Article I, Section 8, U.S. Constitution	6
Playwriting by Bernard Grebanier	6
The Play's The Thing by Lawrence Langner	6
13 C.J. 1113, Section 278, Note 30	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. _____

FLORENCE SCOTT, FORMERLY FLORENCE MESLER MONTAGUE, AN INDIVIDUAL,

Petitioner,

vs.

WKJG, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on May 2, 1967.

OPINIONS BELOW.

The opinion of the District Court for the Northern District of Indiana, Fort Wayne Division, is reported at 149 USPQ 413 and is set forth in the Joint Appendix, page 450. The opinion of the Court of Appeals for the Seventh Circuit, printed in Appendix A, is reported at 376 F.2d 467; 153 USPQ 494.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on May 2, 1967 (App. A). The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether valid copyright subject matter is limited to the arrangement of words the author uses, or does the copyright protection extend to the combination of ideas, plot, dramatic situations, events, development of situations, character, props, direction to actors, and play mechanics.

2. Whether television writers can appropriate the combination of ideas, plot, dramatic situations, events, development of situations, character, props, direction to actors, and play mechanics without infringing the author's valid copyright.

3. Whether the ordinary observer test for copyright infringement preempts the testimony of an expert witness on the issue of infringement.

STATUTE INVOLVED.

This case involves 17 U.S.C. Section 1(b), (d) which provides as follows:

"Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

"(b) To translate the copyrighted work into other language or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever; and . . ."

STATEMENT OF THE CASE

Petitioner, Florence Scott, a housewife, wrote a play entitled "Discretion", which play was subsequently copyrighted on August 11, 1944. The validity of the copyright is not in question.

The infringing play "Conditional Surrender" was telecast by the NBC network on the Loretta Young

Show on May 9, 1962. The Loretta Young Show was supplied and transmitted by NBC to WKJG in Fort Wayne, Indiana, and broadcast by WKJG from its Fort Wayne station to area viewers residing in the northern district of Indiana.

On September 3, 1964, Petitioner brought suit in the District Court for Northern District of Indiana for infringement of the copyrighted play "Discretion" (copyright Class D unp. 90026).

At the trial, which was held on November 4th and 5th, 1965, the Petitioner presented five witnesses. Two English professors from Purdue University testified in substance that if they had received the two plays in their classroom they would have marked the second play as being plagiarized. Two lay witnesses testified that they had seen the NBC play "Conditional Surrender" on television and had immediately called the Petitioner advising her that they had seen the Petitioner's play on television. The Petitioner testified with respect to the background in writing the play, and the similarities existing between the two plays. As a brief illustration, in both plays the wife is knitting when each husband asks the wife for the divorce. The wife agrees to grant the husband a divorce but demands that the husband tell the children about the divorce, take custody of the children, and pay the wife for her interest in the house. Each wife plans to obtain an expensive complete wardrobe, displays a brief sport outfit which shocks her husband and advises her husband that she will pay for the wardrobe with the money received from her share of the house. The wife in each play states that she intends to look for another husband and that she will enjoy the prospect of meeting other men in Reno or Las Vegas when she files for her divorce. Each husband is concerned about the type of men that his wife will meet in this city. All of the above similarities contained in Petitioner's two-and-a-half

hour dramatic play are present in Respondents' twenty-six minute T.V. play.

The Respondents introduced four witnesses, one of which was the WKJG television station manager, who testified with respect to the business relationship between the television station and NBC. The television writer, Lois Hire, testified that she did not copy from Petitioner's play but admitted that the two plays were very similar. Mrs. Taylor, an adult education teacher, testified that Mrs. Hire attended her night adult educational class. The Respondents' expert witness, Professor Dodson from Columbia University, testified with respect to the dissimilarities in the two plays, but on cross-examination admitted to over 50 similarities in the twenty-six minute play.

The lower Court rendered an Order for the Respondents which Order is reproduced in the Joint Appendix at page 450. A Notice of Appeal was filed to the United States Court of Appeals for the Seventh Circuit on February 17, 1966. On May 2, 1967, the Seventh Circuit Court of Appeals rendered its decision affirming the lower Court's Order, which decision is reproduced in Appendix A.

REASONS FOR GRANTING THE WRIT.

1. The Seventh Circuit decision below is in direct conflict with the Ninth Circuit's Court of Appeals decision in **Benny v. Loew's, Inc., et al; Columbia Broadcasting Systems, Inc., et al**, 239 F.2d 532, wherein the Ninth Circuit Court of Appeals held that:

"One cannot copy the substance of another's work without infringing his copyright."

The Ninth Circuit Court of Appeals further held that:

"One person has the sole right to do this — the copyright owner, inasmuch as, under Title 17 U.S.C.A., Section 1, he has the exclusive right to make any other version of the work that he desires. He can have it read or sung or danced or pantomined or burlesqued, because, in the language of the statute, he has the sole right to 'exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever'."

The lower Seventh Circuit Court's decision in the case at bar held that:

"It must be remembered that copyright protection does not extend to ideas, plots, dramatic situations and events. Rather it is limited to the arrangement of words the author uses to express his ideas."

2. It is well recognized that the television medium today consumes material faster than it can be created. If the lower Court's decision is permitted to stand, television writers can appropriate legitimate copyrighted material by merely rearranging the use of words which express the same idea. It is well recognized that the adapting of a play in terms of the television medium, which recreation requires more scenery, action and the shifting of scenes. See **Playwriting** by Bernard Grebanier, p. 183, and **The Play's The Thing** by Lawrence Langner, p. 228. It is submitted that if a television writer can rearrange the words to express the same pattern of the story written by another author and thus avoid infringement, then the value of a valid copyright is substantially diminished. Such interpretation of the Copyright Statute would not give effect to Article 1, Section 8, of the U.S. Constitution, which provides that:

"The Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

3. The Courts in General have applied what is called the ordinary observer or audience test in determining copyright infringement. This test is clearly and concisely set forth at 13 C.J. 1118, Section 276, Note 30, as follows:

"The question really involved in such comparison is to ascertain the effect of the alleged infringing play upon the public, that is, upon the average reasonable man. If an ordinary person who has recently read the story sits through the presentation of the picture, if there had been literary piracy of the story, he should detect that fact without an aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate."

A modification of the audience test was formulated in **Arnstein v. Porter**, 154 F.2d 464, wherein the Court divided the issue of substantial similarity into two separate elements. (1) There is first the question of whether the defendant copied from the plaintiff's work. (2) The second question of whether such copying went so far as to constitute an improper appropriation. Under the Arnstein doctrine (supra), expert analysis and dissection may be used to determine whether the defendant copied from the plaintiff's work. Once copying is established, then on the issue of unlawful appropriation, the Arnstein doctrine (supra) would strictly apply to the audience test and preclude dissection and expert analysis. It is difficult to reconcile the Arnstein Court's opinion (supra) that no dissection is to be permitted on this issue, with the statement in a number of

other decisions that such comparison is to be made only with respect to the protectable portions of plaintiff's work. If the comparison is thus limited, it is hardly reasonable to expect laymen to attempt it without dissection at least to delineate that portion of the plaintiff's work which is protectable. It may be that the Arnstein opinion (supra) is not intended to preclude dissection on the second question for this limited purpose. Although it is clear that the determination of substantial similarity presents an issue of fact, the correct procedure for such determination remains somewhat clouded. In the case at bar, while the Court relied upon the **Arnstein v. Porter** decision, supra, it extended the doctrine to include expert testimony on all issues.

ARGUMENT

The specific questions involved are simply whether copyright protection under the statute extends to the combination of a plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation; or, is the copyright law protection extended only to the arrangement of words the author uses to express his ideas, as held by the lower Court.

A recent decision **Grove Press, Inc. v. Greenleaf Publishing Co.**, 247 F.Supp. 518, has expressly held that the copyright in a novel includes in addition to "the form of communication or the mechanism employed" other material such as "the pattern of the story" adding that "The essence of a novel or any other story for that matter, is the plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation." It is well known that the television industry consumes material faster than it can be created, as evidenced

by the substantial number of re-runs appearing on the television medium today. If such a principle that copyright protection extends only to the arrangement of words of the author, the fruits of a writer's labor remain unsafe from all skilled plagiarists. Every text book writer on playwriting states that it takes weeks and months to conceive the plot, plan, arrangement, characters and play mechanics involved in a play. Once these factors have been conceived, the writing of a play can be consummated in a short time. In the instant case, the television writer was able to write the play in question in twenty four hours, extending over a five-day period when the writer admittedly was bare of ideas, had no outline of plot, events, motivation or character sketches, and made none — nor did she make any revisions or corrections after writing the play. The Petitioner took months to conceive, write and rewrite the dramatic play.

If the lower Court's decision is permitted to stand, it is submitted that copyright infringement litigation can be greatly influenced by an expert witness who is nothing more than a paid advocate in the witness chair. With respect to an expert witness in a copyright case Judge Hand stated: "Argument is argument whether in the box or at the bar, and its proper place is the last."

The television industry has been characterized as a "vast waste land" in its programming. Only by upgrading the programming through recognition of talented writers and dramatists can there be any prospect for upgrading the tasteless and repetitious trivia on the great majority of television programs offered for viewing today. If copyright protection is withheld for legitimate creative talent, the prospects of the television fare in the future will become even more dismal.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ALBERT L. JEFFERS,

Suite 4, Indiana Bank Building
Fort Wayne, Indiana.

Attorney for Petitioner.

APPENDIX

In The

United States Court of Appeals

For the Seventh Circuit

September Term, 1966 — April Session, 1967

No. 15611

Florence Scott, formerly Florence Mesler Montague, an individual,

Plaintiff-Appellant,

v.

WKJG, Inc., and National Broadcasting Company, Inc.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

May 2, 1967

Before Duffy, Senior Circuit Judge, Castle and Swygert, Circuit Judges.

Duffy, Senior Circuit Judge. This suit for damages and injunctive relief was brought by the plaintiff for the alleged infringement by defendants of a copyright owned by her.

Plaintiff Scott testified that when she wrote "Discretion" in 1939, she was a housewife living in Grand Rapids, Michigan; that she wrote it as a one-act radio play as a pilot for a proposed radio

series, but that "Discretion" was never broadcast as a radio play. She testified further that in 1944, after many hours of drafting and rewriting, she expanded "Discretion" into a two and a half hour three-act play. This is the play which was copyrighted by plaintiff in 1944, and with a few brief additions, was presented by an amateur group in Detroit, Michigan, for two performances in 1946.

The play "Discretion" has never been published, publicly circulated or professionally produced. The validity of plaintiff's copyright is not contested.

Up to the time of the alleged infringing telecast in 1962, plaintiff had made fifteen copies of her work some of which she still had on hand. She had circulated her work among several business agents, but without success.

Mrs. Lois Hire is the author of the allegedly infringing play "Conditional Surrender." It is a half hour TV show which was telecast on May 9, 1962 by National Broadcasting Company (NBC) and station WKJG, Inc. in Fort Wayne, Indiana, in presenting "The Loretta Young Show." Mrs. Hire testified she wrote "Conditional Surrender" in 1960 in California, and that it was based upon an idea given to her by the instructor of an adult TV playwriting class which she attended from 1958 to 1960. She testified she completed the play in a five day, twenty hour period.

Mrs. Hire is a professional writer. She has written twelve plays of which seven have been sold and produced on nationally televised productions such as "Bonanza", "U.S. Steel Hour", "Kentucky Jones" and "The Loretta Young Show."

Mrs. Hire testified she had never known of plaintiff's play nor of the plaintiff until the instant suit was commenced. She testified that she had never been in the State of Michigan, and that prior to 1958, she had had no particular interest in plays

or play-writing and had never read any unpublished scripts.

There are similarities in the two plays here involved. Both have the same general stock plot, for each play involves a husband, wife and husband's girl friend situation. It cannot be said that the love triangle plot is, in itself, unique.

Involved in each play is a middle-aged couple having been married for about fifteen years. They have reached a crisis resulting from the husband's involvement with a woman who works in his place of business. In each play the wife apparently accedes to the husband's request for a divorce, but does so in a manner to show to him the disadvantages of such a situation. The wife's terms and her other actions are, in fact, devices by which the wife seeks to defeat her husband's plans for a divorce. In both plays the wife's devices include the requirement that the husband assume the custody of the children, and purchase the wife's interest in the home property.

Also involved in each play is the wife's acquisition of new clothes as a means of attracting men when the wife goes on a hunt for a new husband. There is a further similarity in that the wardrobe suggested by the wife in each case was daring and rather shocking to the husband.

Plaintiff points to certain words and groups of words which, she argues, demonstrate a copying by the defendant. With reference to the suggested divorce, the wife in defendants' play states "Since it has, there's no point in being uncivilized about it. . . ." The wife in Plaintiff's play states ". . . We're two civilized people. . . ." Again, the wife in defendant's play says ". . . I'll line them up and say 'Boys, your father has found a new playmate' " while the wife in plaintiff's play states ". . . The King is dead—long live the King."

Plaintiff also points to the use of the word "brazen." The husband in defendant's play states "I certainly didn't expect this brazen man hunt." In the plaintiff's play the husband states, "You sound brazen."

Plaintiff refers to a grammatical error, the alleged use of "I'd" as a contraction for "I had." However, the use of "I'd" in defendant's "Conditional Surrender" was not a contraction for "I had."

Plaintiff makes references to some additional groups of words called by her "key words," and also additional sentences used in defendant's play which plaintiff claims indicate copying. However, the District Court found that there were no identical or copied word for word sentences or passages in the two plays.

The trial court also found the two plays were so significantly different as to sequence, characterization, characters, scenes, settings and style of writing as to be "two entirely different plays."

In addition, the District Court found there was no evidence or proof of direct access or even the possibility of access to the plaintiff's play by the author or producers of "Conditional Surrender."

A copyright is intended to protect authorship. The essence of a copyright protection is the protection of originality rather than novelty or invention. Wihtol v. Wells, 7 Cir., 231 F.2d 550.

It must be remembered that copyright protection does not extend to ideas, plots, dramatic situations and events. Rather, it is limited to the arrangement of words the author uses to express his ideas. Funkhouser v. Loew's Inc., 8 Cir., 208 F.2d 185, 189, cert. den. 348 U.S. 843; Burnett v. Lambino, S.D.N.Y. 204 F.Supp. 327, 331-2.

To establish the infringement of a copyright, the plaintiff has the burden of proving 1) that the accused work was copied from the copyrighted work, and 2) that the author of the accused work unlawfully appropriated protected material from the copyrighted work. Arnstein v. Porter, 2 Cir., 154 F.2d 464, 468.

Without direct proof of access or proof of a reasonable possibility of access, the courts have quite generally held that access and copying may be implied only if the similarities of the two plays are so striking and of such nature as to preclude the possibility of coincidence, accident or independent creation. Twentieth Century-Fox Film Corp. v. Dieckhaus, 8 Cir., 153 F.2d 893, 898-9, cert. den. 329 U.S. 716; Heim v. Universal Pictures Co., 2 Cir., 154 F.2d 480, 487.

The applicable legal principle has been expressed as "In such circumstances, the similarities must be such that copying is not merely suspected, but is established with reasonable certainty." Pinci v. Twentieth Century-Fox Film Corp., S.D.N.Y. 95 F.Supp. 884, 886.

The trial court pointed out that besides the lack of convincing similarities between the two plays, there are numerous significant differences. Included in such differences, the Court noted that in "Discretion" the wife is the character most emphasized and she appears in eleven of the twelve scenes of the play, while the husband is in only four of them. By contrast, in "Conditional Surrender", the husband is the character most emphasized and he appears in all fifteen scenes, while the wife appears in seven.

The trial court also observed that twelve of the approximately twenty-six minutes of the accused play involve settings that were in no way present in plaintiff's play, and the remaining settings were

typical of plays involving domestic situations.

The trial court specifically found that the alleged similarities are not so striking as to raise the likelihood or the probability that the accused play was copied from the plaintiff's play.

The plaintiff argues that the District Court improperly relied upon the testimony of a paid expert witness for the defense in determining whether there were similarities between the two plays. Expert testimony may be received to assist the trier of facts in an infringement action. Arnstein v. Porter, supra. Therefore, the trial court properly considered that testimony as well as the plaintiff's evidence showing alleged similarities, in reaching its decision.

The various critical findings of the District Court, some of which we have described, are sustained by the evidence in this case. Certainly, they are not clearly erroneous. We agree with the District Court that the plaintiff has not met the required burden of proof.

In the District Court, NBC raised the question of jurisdiction of the Court as to it. The Court denied the motion of NBC to dismiss the action and to quash service of summons. The briefs make only passing reference to this point. The question was not raised in oral argument. NBC did not file a cross appeal. NBC undertook the defense of its co-defendant. However, if the question were properly before us, we would sustain the decision of the District Court on this point.

The judgment for the defendants is

AFFIRMED.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 426

FLORENCE SCOTT, Formerly FLORENCE MESLER MONTAGUE, an Individual,

Petitioner,

v.

WKJG, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EUGENE L. GIRDEN,
200 Park Avenue,
New York, New York 10017,
Counsel for Respondents.

INDEX

PAGE

Questions Presented 1

Statement of the Case 2

Argument 3

Conclusion 7

CITATIONS

Cases:

Arnstein v. *Porter*, 154 F. 2d 464 (2d Cir. 1946) 5, 7

Benny v. *Loew's, Inc.*, 239 F. 2d 532 (9th Cir. 1956), aff'd 356 U. S. 43 (1958) 2, 3, 4

Berlin v. *E. C. Publications, Inc.*, 329 F. 2d 541 (2d Cir. 1964) 3

Burnett v. *Lambino*, 204 F. Supp. 327 (S.D.N.Y. 1962) 6

Caruthers v. *R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937) 5

Columbia Pictures Corp. v. *National Broadcasting Co.*, 137 F. Supp. 348 (S. D. Cal. 1955) 3

Darrell v. *Joe Morris Music Co., Inc.*, 113 F. 2d 80 (2d Cir. 1940) 4, 5

Dellar v. *Samuel Goldwyn, Inc.*, 150 F. 2d 612 (2d Cir. 1945) 5, 6

Echevarria v. *Warner Bros. Pictures, Inc.*, 12 F. Supp. 632 (S. D. Cal. 1935) 6

Fred Fisher, Inc. v. *Dillingham*, 298 Fed. 145 (S.D.N.Y. 1924) 6

Funkhouser v. *Loew's, Inc.*, 208 F. 2d 185 (8th Cir. 1953), cert. den. 348 U. S. 843 (1954) 6

Grove Press, Inc. v. *Greenleaf Publishing Co.*, 247 F. Supp. 518 (E.D.N.Y. 1965) 7

PAGE

Harold Lloyd Corp. v. *Witwer*, 65 F. 2d 1 (9th Cir. 1933) 5

Heim v. *Universal Pictures Co.*, 154 F. 2d 480 (2d Cir. 1946) 5, 7

Jewel Music Pub. Co., Inc. v. *Leo Feist, Inc.*, 62 F. Supp. 596 (S.D.N.Y. 1945) 5

MacDonald v. *DuMaurier*, 75 F. Supp. 653 (S.D.N.Y. 1946) 6

Malkin v. *Dubinsky*, 203 N.Y.S. 2d 501 (1960) 6

Morse v. *Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954) .. 5

Nichols v. *Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930) 7

Pinci v. *Twentieth Century-Fox Film Corp.*, 95 F. Supp. 884 (S.D.N.Y. 1951) 6

Rosen v. *Loew's, Inc.*, 162 F. 2d 785 (2d Cir. 1947) 5, 6

Sarkadi v. *Wiman*, 43 F. Supp. 778 (S.D.N.Y. 1942), aff'd 135 F. 2d 1002 (2d Cir. 1943) 6

Schwarz v. *Universal Pictures Co.*, 85 F. Supp. 270 (S. D. Cal. 1949) 6

Seltzer v. *Sunbrock*, 22 F. Supp. 621 (S. D. Cal. 1938) 6

Shipman v. *R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938) 5

Simonton v. *Gordon*, 12 F. 2d 116 (S.D.N.Y. 1925) 7

Twentieth Century-Fox Film Corp. v. *Dieckhaus*, 153 F. 2d 893 (8th Cir. 1946) 5

Twentieth Century-Fox Film Corp. v. *Stonesifer*, 140 F. 2d 579 (9th Cir. 1944) 5

Wilkie v. *Santly Bros.*, 91 F. 2d 978 (2d Cir. 1937) 5

AUTHORITIES

Yankwich, *Originality In The Law of Intellectual Property*, 11 F.R.D. 457 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 426

FLORENCE SCOTT, Formerly FLORENCE MESLER MONTAGUE, an Individual,

Petitioner,

v.

WKJG, INC., and NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Questions Presented

The petition for certiorari (p. 2) attempts to present questions which completely miss the rationale and import of the holdings of the Trial Court, District Court for the Northern District of Indiana, Fort Wayne Division, 149 U.S.P.Q. 413, as unanimously affirmed by The Court of Appeals for the Seventh Circuit, 376 F. 2d 467, and which demonstrate a complete lack of understanding of basic copyright law.

A fair reading of the Trial Record (as contained in the Joint Appendix), and the District Court and Court of Appeals opinions herein, clearly establishes that petitioner

has failed in her required burden of proof of access, or even a reasonable possibility of access, without which there cannot be copying or infringing use.

Petitioner's main reason for the granting of certiorari appears to be that the traditional holding of non-infringement herein conflicts with the Ninth Circuit Court of Appeals decision in *Benny* v. *Loew's, Inc.*, 239 F. 2d 532 (1956), aff'd by an equally divided Court 356 U. S. 43, (1958). This contention is entirely without merit, and respondents urge that certiorari not be granted absent a clear showing that the comprehensive opinion of the Trial Court, as unanimously affirmed by the Seventh Circuit Court of Appeals is "clearly erroneous".

Statement of the Case

Petitioner's Statement of the Case (pp. 3-5) completely overlooks that the Trial Court, sitting as the trier of fact, believed the testimony of the author of the alleged infringing television play to the effect that she had never seen or read petitioner's play prior to the commencement of this litigation, and that she neither copied from nor infringed petitioner's play.

Petitioner's play was never published, and even the barest possibility of access was so tenuous as to cause the Trial Court to conclude that the evidence could not possibly support a finding of copying.

With respect to alleged similarities between the two works in question, the Trial Court compared the two works, applied the "ordinary observer" test, and found that they were "two different plays" entirely. The testimony of an expert witness to assist the trier of facts in determining the superficiality of alleged similarities was perfectly proper, and in no way diminishes the ultimate finding of non-infringement in the eyes of the trier of fact. Petitioner conceded at trial that there was no evidence or

proof of copying, and the alleged similarities were found by both the Trial Court and Court of Appeals to be patently insufficient to raise the likelihood or even the probability of copying. In fact, the Trial Court found that the alleged similarities are "in different contexts, are stock situations or phrases that are likely to occur in plays concerning the general subject matter of these two plays, or are not similar at all" (J. A. 470-71).

Petitioner has made no effort to show that any of the findings of the Trial Court or Court of Appeals were "clearly erroneous". The reason for this fatal omission is obvious—the findings are fully supported by evidence of probative force.

Argument

The main thrust of petitioner's reasoning in support of the granting of a writ of certiorari appears to be that the Seventh Circuit decision herein conflicts in some unknown way with *Benny* v. *Loew's, Inc., supra.* The *Benny* case was a parody or burlesque case wherein it was held that Jack Benny's television sketch entitled "Autolight" infringed the copyright of the dramatic work entitled "Gaslight". Benny admittedly was satirizing "Gaslight" and admittedly had access to and copied greatly from the protected work. The only contested issue was whether or not the substantial copying, both in quality and quantity, constituted a "fair use". *Cf. Columbia Pictures Corp.* v. *National Broadcasting Co.*, 137 F. Supp. 348 (S. D. Cal., 1955); *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541 (2d Cir. 1964).

In *Berlin*, Circuit Judge Irving R. Kaufman excellently analyzed the *Benny* and *Columbia* holdings at page 544 as follows:

> "The distinction between the two situations, Judge Carter reasoned, turned on the relative significance or

'substantiality'—in terms of both quality and quantity —of the material taken from the original motion pictures. In both cases, the Court recognized in painstaking and scholarly opinions the historic importance and social value of parody and burlesque; in both, it conceded that the parodist must be permitted sufficient latitude to cause his reader or viewer to 'recall or conjure up' the original work if the parody is to be successful. But in Benny's case, the Court concluded, this license had been grossly exceeded. Not only had the parody followed the general plot of the original motion picture, but specific incidents and details had been copied and extensive portions of the dialogue had been reproduced verbatim. It was this borrowing from the original to a far greater degree than that required if the parody is to 'recall or conjure up' that original, which caused the court to reject the defense of 'burlesque'; and, it was in this context that the Court of Appeals for the Ninth Circuit affirmed Judge Carter's determination.

But despite Benny's 'borrowing' of substantially more material from the copyrighted original than was necessary for a successful burlesque, the Benny holding and its accompanying dictum suggesting that parody could not be justified as 'fair use' was roundly criticized by many commentators."

It is inconceivable how the *Benny* parody case, where there was admitted substantial copying, can in any way conflict with the Seventh Circuit affirmation herein of the Trial Court's finding of *no access* and *no copying*.

Irrespective of petitioner's mistaken reliance on *Benny*, a finding of infringement herein cannot be supported unless petitioner can conclusively offer proof that the Trial Court's finding of *no access* and *no copying*, as affirmed unanimously by the Seventh Circuit, was "clearly erroneous". *Darrell* v. *Joe Morris Music Co., Inc.*, 113 F. 2d

80 (2d Cir. 1940). Even assuming *arguendo* that an appellate court, upon reading the two works in question, found the existence of "substantial similarity", the *Darrell* case held that such a finding would not justify a reversal of the Trial Court's finding of no access and no copying.

Rather than conflicting with the Ninth Circuit, the Seventh Circuit opinion herein is a traditional affirmation of copyright law and principles, adopted in all jurisdictions, where there can be no infringement absent proof of access, copying and unlawful appropriation of protected material. See: *Arnstein* v. *Porter*, 154 F. 2d 464 (2d Cir. 1946); *Harold Lloyd Corp.* v. *Witwer*, 65 F. 2d 1 (9th Cir. 1933); *Caruthers* v. *R.K.O. Radio Pictures, Inc.*, 20 F. Supp. 906 (S.D.N.Y. 1937); *Twentieth Century-Fox Film Corp.* v. *Stonesifer*, 140 F. 2d 579 (9th Cir. 1944).

Further, absent direct proof of access or proof of reasonable possibility of access, access and copying may be implied only if the similarities in the two plays are so "striking" and of such a nature as to preclude the possibility of coincidence, accident, or independent creation. *Twentieth Century-Fox Film Corp.* v. *Dieckhaus*, 153 F. 2d 893 (8th Cir. 1946); *Dellar* v. *Samuel Goldwyn, Inc.*, 150 F. 2d 612 (2d Cir. 1945); *Wilkie* v. *Santly Bros.*, 91 F. 2d 978 (2d Cir. 1937); *Heim* v. *Universal Pictures Co.*, 154 F. 2d 480 (2d Cir. 1946); *Shipman* v. *R.K.O. Radio Pictures, Inc.*, 100 F. 2d 533 (2d Cir. 1938); Yankwich, *Originality In The Law of Intellectual Property*, 11 F.R.D. 457.

To impeach the uncontradicted testimony of respondents' credible witnesses as to independent creation, the similarities between the two plays must be so "striking" and so "novel" that they establish copying and piracy with reasonable certainty, and that no other conclusion is reasonably possible. *Rosen* v. *Loew's, Inc.*, 162 F. 2d 785 (2d Cir. 1947); *Morse* v. *Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954); *Jewel Music Pub. Co., Inc.* v. *Leo Feist, Inc.*, 62 F. Supp. 596 (S.D.N.Y. 1945).

Even evidence of access and substantial similarity, totally absent here, does not require the trier of fact to conclude that there was copying or infringement. Accordingly, if the Trial Court herein believed respondents' evidence of independent creation, a finding of no copying may be upheld, even if proof of access and substantial similarity were present here. *Rosen* v. *Loew's, Inc., supra; Malkin* v. *Dubinsky,* 203 N.Y.S. 2d 501 (1960); *Fred Fisher, Inc.* v. *Dillingham,* 298 Fed. 145 (S.D.N.Y. 1924); and *Sarkadi* v. *Wiman,* 43 F. Supp. 778 (S.D.N.Y. 1942), aff'd 135 F. 2d 1002 (2d Cir. 1943).

Petitioner's entire contention of infringement is based on a strained, hypercritical dissection of isolated ideas and words, and the Trial Court was correct in concluding that the two plays were so significantly different as to sequence, characterization, characters, scenes, settings and style of writing as to be "two entirely different plays" (J. A. 473). In affirming this finding, the Seventh Circuit was correct in holding "that copyright protection does not extend to ideas, plots, dramatic situations and events. Rather, it is limited to the arrangement of words the author uses to express his ideas." *Funkhouser* v. *Loew's, Inc.,* 208 F. 2d 185 (8th Cir. 1953), cert. den. 348 U. S. 843 (1954); *Schwarz* v. *Universal Pictures Co.,* 85 F. Supp. 270 (S. D. Cal. 1949); *Echevarria* v. *Warner Bros. Pictures, Inc.,* 12 F. Supp. 632 (S. D. Cal. 1935); *Seltzer* v. *Sunbrock,* 22 F. Supp. 621 (S. D. Cal. 1938); *Pinci* v. *Twentieth Century-Fox Film Corp.,* 95 F. Supp. 884 (S.D.N.Y. 1951); *MacDonald* v. *DuMaurier,* 75 F. Supp. 653 (S.D.N.Y. 1946); *Burnett* v. *Lambino,* 204 F. Supp. 327 (S.D.N.Y. 1962); *Rosen* v. *Loew's, Inc., supra; Dellar* v. *Samuel Goldwyn, Inc., supra.*

Petitioner's second and third purported reasons for granting a writ of certiorari (Pet. pp. 6-8) also totally ignore that the trier of fact herein has found that petitioner's play was not adapted by respondents, and that in fact the two plays in question are two entirely different

plays. With respect to petitioner's assertion that the "ordinary observer or audience test" is reason for granting a writ of certiorari, the Trial Court properly relied on its "own impressions" in finding that the two plays in question were not similar enough, either in the strained aspects listed by the petitioner or in the general impressions left with the average reader or viewer, to establish either copying or infringement and it was perfectly proper for the Trial Court to avail itself of (although not to be bound by) expert testimony. *Arnstein* v. *Porter, supra; Nichols* v. *Universal Pictures Corp.*, 45 F. 2d 119 (2d Cir. 1930); *Heim* v. *Universal Pictures Co., supra; Simonton* v. *Gordon*, 12 F. 2d 116 (S.D.N.Y. 1925).

The only other decision relied upon by petitioner, *Grove Press, Inc.* v. *Greenleaf Publishing Co.*, 247 F. Supp. 518 (E.D.N.Y. 1965), also presupposes access and copying. The findings below of no access and no copying, far from being "clearly erroneous", are fully supported by the evidence of probative force.

CONCLUSION

The writ for certiorari should be denied.

Respectfully submitted,

EUGENE L. GIRDEN,
200 Park Avenue,
New York, New York 10017,
Counsel for Respondents.